

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

RECEIVED

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of

**JAMES A. KAY, JR.**

Licensee of One Hundred Fifty Two  
Part 90 Licenses in the  
Los Angeles, California Area

DOCKET FILE COPY ORIGINAL

WT DOCKET NO. 94-147

To: The Commission

**PETITION FOR RECONSIDERATION  
ON BEHALF OF JAMES A. KAY, JR.**

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List A B C D E

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Counsel for James A. Kay, Jr.

Dated: February 25, 2002

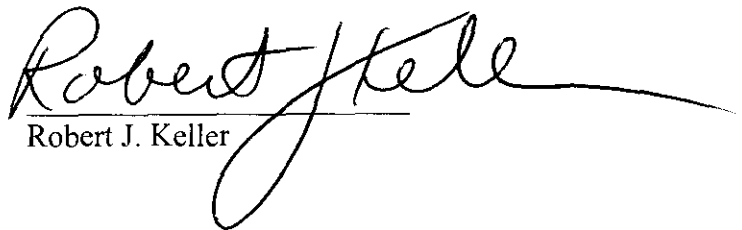
ORIGINAL

**Certificate of Service**

I, Robert J. Keller, counsel for James A. Kay, Jr., hereby certify that on this 25th day of February, 2002, I caused copies of the foregoing **PETITION FOR RECONSIDERATION** to served, by U.S. mail, first class postage prepaid, and by facsimile to the officials and parties or record in WT Docket No. 94-147, as follows:

Charles W. Kelley, Chief  
Investigations and Hearing Division  
Enforcement Bureau  
Federal Communications Commission  
445 12th Street, S.W. – Room 3-B431  
Washington, D.C. 20554

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Federal Communications Commission  
1270 Fairfield Road  
Gettysburg, Pennsylvania 17325-7245

  
Robert J. Keller

## **SUMMARY**

The Commission erred in failing to give deference, as between two ALJs who came to conflicting evaluations of the same situation, to the judge who had greater exposure to the party witnesses; who also heard substantially more evidence and testimony, both critical of the party witnesses; who heard the case second and was acutely aware of the previous ruling, and who made explicit credibility and demeanor findings in support of this position.

Kay did not violate Section 308(b) of the Act. He was fully entitled to interpose legal objections to both the substance and scope of the information request, and he was under no legal compulsion in the absence of statutory subpoena procedures. The request was, in any event, overbroad in its scope and was therefore unduly burdensome. Apart from these legal points, Kay's conduct was in any event justified because of his grave confidentiality concerns, generated and exacerbated by the Bureau's own misconduct, and because of the disruption from the Northridge Earthquake.

The Commission erred in attributing a disqualifying lack of candor to the licensee. There is absolutely not evidence in the record to demonstrate deceptive intent, an essential element for a lack of candor finding. The overwhelming record evidence in fact shows that there was no intent to deceive and no incentive to do so.

Finally, in reconsidering the transfer of control issue in WT Docket No. 97-56, the Commission should also take into account the extensive relevant factual findings in this proceeding.

EMERGENCY DEPARTMENT  
MEDICAL RECORD II



75366

KAY, JAMES  
A# 43305648 MR 1463040  
10-09-1956 DOB 07-24-97  
P.O. BOX 7890 CA  
VAN NUYS 91409  
HOME 818-744-3565  
W.K. M X

Patient Information

PHYSICIAN ORDERS

FOR RESULTS OF LABORATORY TESTS AND CULTURE REPORTS CALL 994-3878 FROM 9 a.m.-1 p.m. MONDAY-FRIDAY

YOUR FOLLOW-UP CARE IS VERY IMPORTANT - PLEASE KEEP YOUR APPOINTMENT. IF YOUR ILLNESS GETS WORSE OR CHANGES IN AN UNEXPECTED WAY, RETURN TO THE EMERGENCY DEPARTMENT. IF YOU HAVE DIFFICULTY ARRANGING THE APPROPRIATE FOLLOW-UP VISIT, PLEASE CALL 994-3878 AND OUR QUALITY ASSURANCE NURSE WILL ASSIST YOU.

THE EMERGENCY DEPARTMENT ATTENDING PHYSICIAN INTERPRETED X-RAY FILMS TAKEN DURING YOUR VISIT. YOU WILL BE NOTIFIED IF THERE ARE ANY SIGNIFICANT DISCREPANCIES WHEN THE RADIOLOGIST REVIEWS THE FILM. YOUR PHYSICIAN MAY CALL THE RADIOLOGY DEPARTMENT AT 994-4603 TO OBTAIN A FINAL READING.

PLEASE TURN PAGE OVER FOR INSTRUCTION ON HEAD INJURY, ABDOMINAL PROBLEMS, SPRAINS, BRUISES, AND WOUND INSTRUCTIONS.

INSTRUCTIONS

DIAGNOSIS	Kidney Stone	SYMPTOMS	Pain
		MECH. OF INJURY	
CO-MORBIDITY	Hypertension	PROCEDURES	

1. FOLLOW-UP: Urologist at home
- ☐ YOU SHOULD BE RE-EXAMINED IN 4-5 DAYS. CALL AS SOON AS POSSIBLE FOR APPOINTMENT.
- ☐ IF NOT IMPROVING AFTER        DAYS, CALL FOR THE NEXT AVAILABLE APPOINTMENT.
- ☐ ADDITIONAL FOLLOW-UP: 4 weeks in urology clinic

YOU WERE SEEN BY (PRINT CLEARLY)

DR. Kelly

DR. H. G. G.

WORK RELATED? ☐ YES ☐ NO

       DAYS FULL DISABILITY

       DAYS LIGHT DUTY

☐ SICK CERTIFICATE GIVEN

2. RETURN TO EMERGENCY UNIT IF: Worse pain than now

3. ADDITIONAL INSTRUCTIONS (e.g. activity, diet): drink lots of fluids  
strain urine

PRESCRIPTIONS	1. Adv. 134 pills every 6 hrs for pain	#Rx	#To Go
	2. <u>      </u>	#Rx	#To Go
	3. <u>re-eval - 2 wks 4-6 hrs as needed</u>	#Rx	#To Go <u>20</u>

INSTRUCTION SHEETS	PENDING LABS
--------------------	--------------

I HAVE READ, UNDERSTOOD AND RECEIVED A COPY OF MY DISPOSITION RECORD.

X [Signature]  
PATIENT'S SIGNATURE

DIAGNOSTIC TESTS

LAB	<input type="checkbox"/> CBC	<input type="checkbox"/> SMA-6	<input type="checkbox"/> GLU	<input type="checkbox"/> C.E.	RADIOLOGY STUDY	DEM PHYS. READING
	WBC	+ <	<input type="checkbox"/> ETOH	OTHER: <u>uric acid @ 3.2 @ 2.1</u>		
	HCT		<input type="checkbox"/> AMY			
	Pit		<input type="checkbox"/> HCG (URINE)			
<input type="checkbox"/> EKG E.D. INTERPRETATION				D STICK	BREATHLIZER	
<input type="checkbox"/> CONSULT(S)				U	C	CONDITION ON DISCHARGE:
				A	+	<input type="checkbox"/> IMPROVED <input type="checkbox"/> UNCHANGED <input type="checkbox"/> OTHER
				S		
NURSE'S SIGNATURE				TIME OUT		THIS PATIENT HAS <u>      </u> BEEN PERSONALLY SEEN AND EXAMINED BY ME
HOUSESTAFF SIGNATURE						
						ATTENDING PHYSICIAN'S SIGNATURE

ATTENDING PHYSICIAN'S SIGNATURE

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TAKE CHECKS PAYABLE TO:



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WASHINGTON DC  
MEDICAL FACULTY ASSOCIATES

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Washington, DC 20037

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PAGE # 1

Telephone Inquiries: 703-846-9364

ADDRESSEE:



JAMES KAY  
P.O. BOX 7890  
VAN NUYS, CA 91409

IF PAYING BY MASTERCARD, VISA OR AMERICAN EXPRESS, FILL OUT BELOW.

CHECK CARD USING FOR PAYMENT		
<input checked="" type="checkbox"/> MASTERCARD	<input type="checkbox"/> VISA	<input type="checkbox"/> AMERICAN EXPRESS
CARD NUMBER	AMOUNT	
SIGNATURE		EXP DATE
STATEMENT DATE	PAY THIS AMOUNT	ACCT. #
07/31/97	\$297.00	1483040
DUE DATE	SHOW AMOUNT PAID HERE \$	
08/15/97		

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MEDICAL FACULTY ASSOCIATES  
DEPARTMENT 0005  
WASHINGTON, DC 20073

☐ Please check box if above address is incorrect or insurance information has changed, and indicate change(s) on reverse side.

STATEMENT

PLEASE DETACH AND RETURN TOP PORTION WITH YOUR PAYMENT

0-Ais-3a1

DATE OF SERVICE/TRANSACTION	INVOICE	DESCRIPTION OF SERVICE	CHARGES/PAYMENTS/ALLOWANCES	PAYMENTS FROM PATIENT	BALANCE DUE FROM PATIENT
07/28/97	3196033	SERV BYSUNG LEE MD (HB) EKG #148	64.00		64.00
	3200992	EKG INTERPRET & REPORT			
07/28/97		SERV BYTENAGNE HAILEMARIAM	233.00		233.00
		DEM EMERGENCY ME			
		EXTENDED (LEVEL IV)			
<p>o/o Info to billing w/str. sec. check again.</p>					
BILL DATE:	PATIENT NAME:		ACCOUNT #:		PLEASE PAY THIS BALANCE
07/31/97	JAMES KAY		1483040		\$297.00

\* PAYMENTS RECEIVED AFTER BILL DATE WILL APPEAR ON YOUR NEXT STATEMENT.

YOUR BALANCE IS NOW DUE. HOWEVER, IF YOU HAVE INSURANCE COVERAGE, PLEASE INFORM US IMMEDIATELY. PLEASE COMPLETE THE REVERSE SIDE OF THE STATEMENT AND RETURN IT TO US.

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
<b>JAMES A. KAY, JR.</b>	)	
	)	<b>WT DOCKET NO. 94-147</b>
Licensee of One Hundred Fifty Two	)	
Part 90 Licenses in the	)	
Los Angeles, California Area	)	

To: The Commission

**PETITION FOR RECONSIDERATION**

James A. Kay, Jr. ("Kay"), by his attorneys and pursuant to Section 405 of the Communications Act of 1934, 47 U.S.C. § 405, as amended, and Section 1.106 of the Commission's Rules and Regulations, 47 C.F.R. § 1.106, respectfully petitions the Commission to reconsider the actions announced by its *Decision* (FCC 01-341), released January 25, 2002 ("Kay Decision"), in the above-captioned matter.<sup>1</sup>

**I. THE CONFLICT BETWEEN TWO JUDGES**

Two different administrative law judges, in different hearings, considered essentially the same core facts and issues of this matter but came to irreconcilably different factual determinations and legal conclusions.<sup>2</sup> This is of no small concern, because the central and most grave issue in these cases—the assertion that Sobel and Kay lacked of candor with the

---

<sup>1</sup> Rather than reargue all of the issues that culminated in the *Kay Decision*, Kay limits this *Petition For Reconsideration* to the specific subjects addressed herein. Kay does not, however, concede or abandon any previous position or argument. Kay's silence herein as to any particular matter shall not be construed as an acquiescence, concession, or waiver. Kay expressly reserves the right to argue, in any judicial appeal or other proceeding, matters previously presented to the Commission in the following pleadings: (a) Sobel's *Consolidated Brief and Exceptions* (12-Jan-98), as corrected by *Errata* (13-Jan-98) (b) *James A. Kay's Consolidated Brief and Exceptions to the Initial Decision of Administrative Law Judge John M. Frysiak* (12-Jan-98) (c) *Motion for Leave to File Supplement to Consolidated Exceptions* (28-May-98) (d) *Further Motion for Leave to File Supplement [to] Exceptions* (2-Oct-98); (e) *Petition to Defer and Consolidate Consideration* (2-Mar-99) (f) *Supplement to Petition to Defer and Consolidate Consideration* (29-Nov-99); and (g) *Motion for Special Relief* (5-May-97).

<sup>2</sup> Compare: *Initial Decision of Administrative Law Judge John M. Frysiak*, 12 FCC Rcd 22879 (1997) ("Frysiak Decision") in WT Docket No. 97-56, and *Initial Decision of Chief Administrative Law Judge Joseph Chachkin*, FCC 99D-04 (ALJ, 10-Sep-99) ("Chachkin Decision") in WT Docket No. 94-147.

DATE OF BILL	DATE OF PREV. BILL
CYCLE 08/06/97	
INS.	

**The George Washington University**  
WASHINGTON DC  
MEDICAL CENTER

901 23RD STREET, NW  
WASHINGTON, DC 20037  
202 994-8844  
FEI # 23-2896725

PAGE NO

1

HOSP NO

705

X	E	PATIENT NAME	PATIENT NUMBER	SEX	AGE	ADMISSION DTE	DISCHARGE DTE	DAYS	OUT PATIENT
		KAY, JAMES	43305648	M		07/28/97			
GUAR PH: 818-894-3566									

GUARANTOR NAME AND ADDRESS	COB	INSURANCE COMPANY NAME	GROUP NO.	POLICY NUMBER
JAMES KAY P.O. BOX 7890 VAN NUYS, CA 91409	1	S/P HMO NO CONTRA		1483040000

PLEASE RETURN THIS PORTION WITH YOUR PAYMENT.

AMOUNT OF  
PAYMENT

\$

DATE OF SERVICE	DESCRIPTION OF HOSPITAL SERVICES	SERVICE CODE	TOTAL CHARGES	EST. COVERAGE INS. CO. NO. 1	EST. COVERAGE INS. CO. NO. 2	EST. COVERAGE INS. CO. NO. 3	EST. COVERAGE INS. CO. NO. 4	AMOUNT
-----------------	----------------------------------	--------------	---------------	------------------------------	------------------------------	------------------------------	------------------------------	--------

## DETAIL OF CURRENT CHARGES, PAYMENTS AND ADJUSTMENTS

7/28	0001 IV SOLUTION	25194218	30.00	30.00				
7/28	0001 ER I.V. THE	25194242	35.00	35.00				
7/28	0001 ER PULSE OX	25093238	49.00	49.00				
7/28	0001 ER CARDIAC	25093170	116.00	116.00				
7/28	0001 ELECTROCARD	24230005	59.00	59.00				
7/28	0001 PROMETHAZIN	28123800	5.91	5.91				
7/28	0001 KETOROLAC (	28138691	22.35	22.35				
7/28	0001 MORPHINE 10	28443554	6.50	6.50				
7/28	0002 PERCOCET-5	28935328	7.40	7.40				
7/29	0001 URINALYSIS,	27710763	7.00	7.00				
7/28	0001 BASE LEVEL	25092479	378.00	378.00				

## SUMMARY OF CURRENT CHARGES

RESPIRATORY SVCS	49.00	49.00
CARDIOLOGY	175.00	175.00
EMERGENCY ROOM	443.00	443.00
CLINICAL PATH	7.00	7.00
PHARMACY	42.16	42.16

## SUB-TOTAL OF CURR. CHARGES

716.16 716.16

GUAR RELATIONSHIP:

ACC DATE: 07/28/97

DIAGNOSIS:

TYPE: 8

592.0

SEX: M

TIME: 0:01

GUAR NO: 1483040000

PLACE: AM

EMPL REL: N

TOTALS

716.16

716.16

43305648  
PATIENT NUMBERPLEASE REFER TO PATIENT  
NUMBER ON ALL INQUIRIES  
AND CORRESPONDENCE.ADDITIONAL PATIENT BILLING MAY BE NECESSARY FOR  
ANY CHARGES NOT POSTED WHEN THIS BILL WAS  
PREPARED, OR IF INSURANCE CARRIERS DO NOT PAY  
ANY PART OF THE AMOUNTS SHOWN UNDER ESTIMATED  
INSURANCE COVERAGE.



Commission—inescapably turns on determining the subjective intent of the licensees. This is not a simple matter of examining the transcripts and exhibits to discern an objective, external fact, and the deliberative processes of the judges and may not be ignored in favor of the Commission's own take on a cold record.<sup>3</sup> The Commission's decision to favor the *Frysiak Decision* over the *Chachkin Decision* is not justified in the present circumstances.

First, Chief Judge Chachkin, unlike Judge Frysiak, made specific credibility and demeanor findings. He expressly found that "Kay and Sobel testified ... and answered questions put to them in a candid and forthright manner" and that "[t]heir testimony that they did not intend to deceive the Commission concerning their business dealings is entirely credible and is accepted."<sup>4</sup> These express findings may not be ignored.<sup>5</sup>

As the only decision maker to actually observe the witnesses' testimony, an ALJ's "findings are by law entitled to great weight and considerable deference,"<sup>6</sup> and the Commission "may not upset these findings unless such reversal is supported by substantial evidence."<sup>7</sup> Thus, an ALJ's credibility and demeanor findings are "entitled to great weight,"<sup>8</sup> and must be upheld unless they patently conflict with other record evidence.<sup>9</sup>

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<sup>3</sup> Kay nonetheless maintains, for the reasons asserted herein as well as in previous arguments presented to the Commission, that even such an objective review of the record fully justifies resolving all issues in his favor.

<sup>4</sup> *Chachkin Decision*, Findings ¶ 173.

<sup>5</sup> While Judge Frysiak did not make explicit demeanor findings, moreover, it should be noted that Kay was seriously ill during the course of his testimony in the Sobel Proceeding. Sobel Tr. 321-323. Attachment No. 1 hereto are documents corroborating the fact that Mr. Kay, his worsening condition prompting him to visit a clinic, was thereafter transported to a hospital emergency room on the evening before he testified. Kay does not contend that this condition in any way affected the accuracy of his testimony, but the Commission may not dismiss the possibility that his condition might have impacted his demeanor as perceived by Judge Frysiak. In the absence of explicit demeanor findings by Judge Frysiak, including his assessment of the impact, if any, of Kay's medical condition on his demeanor—the Commission may not dismiss Judge Chachkin's favorable demeanor findings simply because the judges' conclusions differed.

<sup>6</sup> *Ramon Rodriguez and Associates, Inc.*, 9 FCC Rcd 3275 at ¶ 4 (Rev. Bd. 1994), citing *Lorain Journal Co. v. FCC*, 351 F.2d 824 (DC Cir 1965), cert. denied, 383 US 967 (1966).

<sup>7</sup> *Ramon Rodriguez and Associates*, supra, 9 FCC Rcd at ¶ 4, citing *WHW Enterprises, Inc. v. FCC*, 753 F.2d 1132, 1141-42 (DC Cir 1985). Accord, *WEBR, Inc. v. FCC*, 420 F.2d 158, 162 (DC Cir 1969).

<sup>8</sup> *Broadcast Associates of Colorado*, 104 FCC 2d 16, 19 (1986).

<sup>9</sup> *Milton Broadcasting Co.*, 34 FCC 2d 1036, 1045 (1972); *KQED, Inc.*, 3 FCC Rcd 2821, 2823 (Rev. Bd. 1988), rev. denied, 5 FCC Rcd 1784 (1990), recon. denied, 6 FCC Rcd 625 (1991), aff'd sub nom. *California Public Broadcasting Forum v. FCC*, 947 F.2d 505 (D.C. Cir. 1991) (Memorandum).



DISTRICT OF COLUMBIA  
FIRE AND EMERGENCY MEDICAL SERVICES DEPARTMENT  
EMERGENCY MEDICAL SERVICES BUREAU  
P.O. BOX 37433, WASHINGTON, D.C. 20013  
(202) 289-2235

TAX I.D. # 53-6001131

DTXDB9809

# AMBULANCE SERVICE BILL

97075383

JAMES KAY  
P.O BOX 7890  
VAN NUYS, CA 91409-7890

7890 7881  
08/01/97 06

According to our records, you have failed to respond to our NOTICE OF EMERGENCY SERVICE FEES, REQUEST FOR INFORMATION. As a result you are now being billed directly for these services. Ambulance service fees are the responsibility of the person receiving the service.

**THIS BILL IS SEPARATE FROM YOUR HOSPITAL BILL.**

Make checks or money orders payable to the **D.C. TREASURER**. If you desire to pay by credit card, please complete the credit card authorization on the reverse side. Please return this notice with payment or insurance information in the envelope provided. Your canceled check is your receipt.

ACCOUNT NUMBER: <b>97075383</b>	DATE OF SERVICE: <b>07/28/97</b>	INCIDENT NUMBER: <b>075383</b>	COST OF SERVICE: <b>\$362.00</b>
SERVICE FROM: <b>815 CONN AVE NW</b>	SERVICE TO: <b>GEORGE WASH. UNIV. HOSPITA</b>		

If you have Medicaid, Medicare, or other medical insurance (Blue Cross/Blue Shield, Continental, Kaiser etc.), they may pay this fee for you. Please provide your Medicaid, Medicare, or other medical insurance information and signature below. We will bill your insurance company for you. You are responsible for any balance not paid or not covered by your insurance.

MEDICARE		MEDICAID	
Medicare Number		Medicaid Number	
OTHER HEALTH INSURANCE			
Insurance Company Name:		Policy Number:	
Insurance Company Address:		Group Number:	
City, State and Zip Code:		Policy Holder's Name:	

☐ I do not have Medicaid, Medicare, or other medical insurance.  
**IS MEDICARE SECONDARY? YES NO IS THIS WORK RELATED? YES NO**  
**YOU MUST SIGN BELOW FOR PAYMENT TO BE SENT DIRECTLY TO US.**

### RELEASE OF INFORMATION & PAYMENT AUTHORIZATION

I request that payment of authorized Medicare and/or insurance benefits be made to me or on my behalf for any services furnished me by the DC Fire and Emergency Medical Services Department. I authorize any holder of medical or other information about this or any other Medicare or insurance claim to release to the Health Care Financing Administration, its agents or insurers any information needed to determine these benefits to related services.  
**YOUR INSURANCE HAS PARTIALLY PAID OR NOT RESPONDED. PLEASE PAY AMOUNT SHOWN.**

Signature: \_\_\_\_\_ Date: \_\_\_\_\_

There is ample reason for the Commission to afford weight to Judge Chachkin's credibility findings notwithstanding Judge Frysiak's earlier contrary ruling. First, Judge Chachkin had a substantially greater opportunity to observe the demeanor of the witnesses. The Sobel Hearing was completed in less than two days, including the admissions session. The Kay hearing, by contrast, consumed some 12 days of trial, not including the admissions session. Kay testified for more than 5 days, and Sobel testified for the better part of one day.

Judge Chachkin also had the benefit of hearing several other witnesses whose testimony had a bearing on the issues at hand, many of whom were adverse to Kay and Sobel. He was therefore able to compare the totality of the testimony from all the witnesses. Kay and Sobel were the only witnesses in the Sobel proceeding. In the Kay proceeding, however, there were a total of fourteen witnesses in addition to Kay and Sobel, including past and present employees, colleagues, and business associates who knew and have worked closely with one or both men. Judge Chachkin had the benefit of being able to consider and weigh their testimony and demeanor in addition to that of the licensees.

The fact that the *Frysiak Decision* preceded the *Chachkin Decision* by nearly two years is further reason to give deference and greater weight to the latter. Judge Chachkin is a competent attorney and judge, with years of hearing experience, and more than twenty years on the bench. He naturally would not take lightly the fact that a fellow judge had already heard testimony and considered evidence on the same situation, and he would therefore demand convincing evidence to be lead to a contrary result. While this would be true of human nature as a purely subconscious matter, it was something very much in Chief Judge Chachkin's conscious mind. He specifically acknowledged and addressed the *Frysiak Decision*. This is not merely a case of two judges arriving at different conclusions on the same evidence, it is rather a case of one judge subsequently taking a harder look at much more extensive evidence and carefully considering the strength of that evidence in light of the prior ruling.

**ATTACHMENT No. 1**

**ATTACHMENT No. 1**

There is yet an additional reason for discounting the *Frysiak Decision*, particularly with regard to the candor issue. Judge Frysiak made the demonstrably erroneous statement that "Sobel has not offered any proposed findings on the added misrepresentation issues."<sup>10</sup> In fact, Sobel expressly "denie[d] the allegations of misrepresentation and reserve[d] the right to reply to any proposed findings or conclusions offered by the Bureau on the added issues," but did not offer specific findings in his initial pleading on the grounds that the Bureau had not met its burdens of proceeding and proof.<sup>11</sup> In response to the Bureau's pleading, moreover, Sobel offered extensive reply findings and conclusions on the issue.<sup>12</sup> Thus, Judge Frysiak did not even acknowledge, much less address, Sobel's extensive proposed findings and conclusions regarding the candor issue. As between the two judges, the Commission certainly may not defer to the one who entirely ignored Kay's and Sobel's side of the case on the most crucial issue.

## II. SECTION 308(b) ISSUE

The entire basis for the Commission's conclusion that Kay has violated Section 308(b), therefore, rests solely on a fact that Kay has never denied, namely, that he failed to provide some of the information sought in the Section 308(b) Request prior to the designation of this case for hearing.<sup>13</sup> Kay respectfully seeks reconsideration of the Commission's adverse resolution of this issue. First, as a purely legal matter, Kay did not violate any legal obligation. Second, even

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<sup>10</sup> *Frysiak Decision* at 15 n.3.

<sup>11</sup> *Proposed Findings of Fact and Conclusions of Law* at 2 n.1.

<sup>12</sup> See Sobel's Reply to the Wireless Telecommunications Bureau's Proposed Findings of Fact and Conclusions of Law at 1-16.

<sup>13</sup> In *Carol Music, Inc.*, 37 F.C.C. 37, 3 Rad. Reg. 2d (P&F) 477 ¶ 3 (1964), a broadcast licensee was disqualified in part because it "failed and refused to file with the Commission copies of contracts, agreements and other information required to be filed by statute and rule, and thereby concealed information relevant to its operations required by the Commission," *id.*, but it is clear that (a) the information withheld by the licensee, which later was developed in hearing, turned out to be extremely incriminating, and (b) the licensee's disqualification was based on the underlying violations and noncompliance, and not exclusively or even primarily on the licensee's failure to provide the requested information. This is in sharp contrast to Kay's situation in which (a) his pre-hearing responses were accompanied by *bona fide* legal objections; (b) there were extenuating circumstances preventing a complete and timely response; (c) he subsequently produced all of the material requested during discovery; and (d) the full evidence later developed at hearing did not reveal any instances of serious transgressions.

result of the submission, the Bureau subsequently granted the applications in question.<sup>72</sup> In any event, there was no issue designated regarding this particular matter, Judge Chachkin's exclusion of this matter from evidence was proper,<sup>73</sup> and the Commission's effort to raise it at this late date is legally improper,<sup>74</sup> not to mention procedurally unfair.

#### IV. UNAUTHORIZED TRANSFER OF CONTROL ISSUE

Notwithstanding the Commission's ruling that Kay is prevented by collateral estoppel from litigating the transfer of control issue in this proceeding, Kay nonetheless calls to the Commission's attention the fact that he and Sobel have jointly sought reconsideration on that issue in the Sobel proceeding.<sup>75</sup> The reasoning set forth in Section I of this *Petition for Reconsideration* not only justifies, but requires the reconsideration this issue.

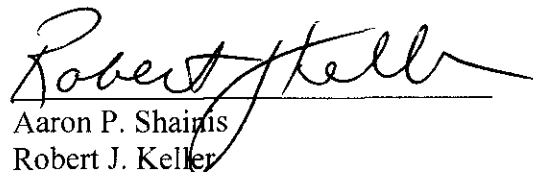
#### V. CONCLUSION

WHEREFORE, Petitioner James A. Kay, Jr., respectfully request that the Commission reconsider its *Decision* (FCC 01-341), released January 25, 2002, in the above-captioned matter.

Respectfully submitted:

**James A. Kay, Jr.**

By:



Aaron P. Shainis  
Robert J. Keller  
Shainis and Peltzman, Chartered  
1850 M Street, N.W. – Suite 240  
Washington, D.C. 20036-5803  
202-93-0011 ext. 109

Dated: February 25, 2002

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<sup>72</sup> The letters in question were submitted with respect to applications in FCC File Nos. 614563, 614564, and 614566. The Commission may take official notice of the fact that these applications were, after receipt of the letters in question, processed and granted by the Bureau.

<sup>73</sup> Kay Tr. 790.

<sup>74</sup> *The Telephone Co., Inc.*, 41 RR 2d 611, 616-617 (1977).

<sup>75</sup> See Section IV of the *Joint Petition for Reconsideration* filed concurrently in WT Docket No. 97-56.

assuming Kay was under a legal obligation to produce additional information prior to designation, his failure to do so was justified in the special circumstances of this case.

**A. No Violation of Section 308(b)**

(1) No Binding Obligation to Respond to Informal Information Requests

The Commission has recognized that a staff request for information—even one that invokes Section 308(b) of the Act—is subject only to **voluntary** compliance by the recipient, unless the Commission invokes formal procedures, *e.g.*, the issuance of a subpoena. In *PTL of Heritage Village Church and Missionary Fellowship, Inc.*, the Commission observed:

[T]he Commission expects its licensees to cooperate with staff-conducted informal investigations. Sections 403 and 409 of the Act provide the Commission the formal means, *i.e.* subpoena, to obtain books, records and information, but resort to these means in informal investigations has traditionally been unnecessary since most licensees recognize the Commission's authority to inspect such documents. However, when licensees refuse to cooperate in this **voluntary procedure** and insist upon formal procedures the Commission will institute a formal proceeding to obtain the information. Under these circumstances, the Commission does not believe its request of licensees to **voluntarily make available information** under their control constitutes an unreasonable search under the Fourth Amendment to the Constitution.<sup>14</sup>

Section 409(e) of the Communications Act confers upon the Commission “the power to require by subpoena ... the production of all books, papers, schedules of charges, contracts, agreements, and documents relating to any matter under investigation.”<sup>15</sup> But Commission subpoenas are not self-enforcing. Section 409(g) provides that an order compelling compliance with such a subpoena shall issue from an appropriate federal district court.<sup>16</sup> The subpoena process is a formal mechanism for obtaining a binding resolution of a licensee’s objections to an informal request when such objections can not be resolved informally. Clearly, if a subpoena issued by the Commission in a formal proceeding requires judicial enforcement, an informal

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<sup>14</sup> 71 F.C.C.2d 324 at ¶ 12, 45 Rad. Reg. 2d (P&F) 639 (1979) (emphasis added).

<sup>15</sup> 47 U.S.C. § 409(e).

<sup>16</sup> 47 U.S.C. § 409(f).

Church, in an attempt to compensate for the lack of any evidence of deceptive intent, “the Commission has overstated the word[s] clarity.”

(4) Miscellaneous

The Commission then attempts to divine a phantom “pattern of deception” to accompany the nonexistent deceptive intent. It is erroneously suggested, for example, that Kay has also been less than forthcoming regarding similar management agreements.<sup>67</sup> But the credibility of both of the individuals on whom the Commission relies, Carla Pfeifer<sup>68</sup> and Vincent Cordaro,<sup>69</sup> is severely lacking. Not only is there no credible evidence that Kay concealed (or intended to conceal) these agreements, there is in fact unequivocal and uncontested evidence that the never had any motive or incentive to do so.<sup>70</sup>

Equally unavailing is the Commission’s attempt to asperse Kay regarding the redaction of the return billing address from business documents he submitted on behalf of Sobel in response to certain application return notices.<sup>71</sup> The redaction itself was obvious, being done in heavy black marker—hardly a clandestine attempt at concealment. Thus, Commission staff could easily see that the information had been redacted and could have requested more information if they felt it necessary. The Bureau never sought additional information because documents as tendered were adequate and the redacted information was irrelevant to the inquiry at hand. Indeed, as a

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<sup>67</sup> Kay Decision at ¶ 97.

<sup>68</sup> Pfeifer purports to have vague and incomplete recollections about events that allegedly occurred ten plus years ago. She questions whether her signature on various documents is genuine, even though (a) the documents were all in her possession until such time as they were turned over to FCC investigators, and (b) she has no idea of who might have signed them. She acknowledged that she acquired the station as a business opportunity, but then she claims to have agreed to assign the license without any information or understanding of what the terms of the assignment were to be; indeed, she was not even aware until she was cross-examined at the hearing that the assignment had in fact been granted years ago. It is questionable whether Ms. Pfeifer’s testimony is good for anything, but it is certainly not adequate to sustain the Bureau’s burden of proof.

<sup>69</sup> Cordaro tells inconsistent stories. At hearing he denied having obtained an authorization in pursuit of an independent business activity; but in 1992 he signed and submitted to the Commission a declaration, under penalty of perjury, attesting to the opposite. WTB Ex. 351 at pp. 2 & 5. Also, the evidence adduced shows that Cordaro lied to the Bureau during the investigation, to Kay during discovery, and to the Presiding Judge and the Commission during the hearing regarding the facts and circumstances surrounding computer files he removed from Kay’s system.

<sup>70</sup> E.g., Kay Tr. 2432-2433, 2479-2483.

<sup>71</sup> Kay Decision at ¶ 98.



request for information from a low-level Commission employee can not possibly impose a mandatory obligation on a licensee.

(2) The Right to Present Legal Objections

Kay did not ignore or refuse to respond to the 308(b) request; rather, his communications counsel timely interposed a number of legal objections to the requests and engaged in a series of correspondence seeking to have the request clarified and its scope narrowed. The essence of this issue, therefore, is whether Kay should be disqualified or otherwise sanctioned because of his pre-hearing assertion of legal objections, attempts to seek clarification, and efforts to narrow the scope of the request.<sup>17</sup>

Notwithstanding the Commission's concession that "Kay's responses [to the 308(b) Request] raised some legitimate points,"<sup>18</sup> it asserts that "Kay should have sought Commission review,"<sup>19</sup> or "Commission intervention if he desired to pursue th[ese] issue[s]."<sup>20</sup> But neither the Commission's procedural rules nor the Statutory scheme under which the Commission operates contemplates this. The procedural rules contemplate that matters will play out at the Bureau level, with the Commission's staff exercising delegated authority, and that the party will have the opportunity to seek staff reconsideration,<sup>21</sup> and/or Commission review,<sup>22</sup> of the ultimate Bureau action. But in this case, rather than itself issuing an ultimate ruling, the Bureau went to the Commission on an *ex parte* basis and arranged for the hearing designation order. Kay was thus deprived of a pre-designation opportunity to present his objections to the Commission, because

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<sup>17</sup> After designation, and subject to the proper exercise of his right to interpose and be heard on legal objections, Kay timely complied with all discovery demands made at hearing by the Bureau as modified by the Presiding Judge. He did so when the Bureau was no longer in control but was merely a party, and *after* the Presiding Judge made an affirmative determination "that the Bureau will exercise care in disclosing the information to third parties," and also directed the parties to "discuss terms of a limited and narrowly tailored protective order which will not unduly burden or impede the Bureau's preparation for trial." *Memorandum Opinion and Order* (FCC 95M-77; released March 22, 1995).

<sup>18</sup> *Kay Decision* at ¶ 48.

<sup>19</sup> *Id.* at ¶ 43.

<sup>20</sup> *Id.* at ¶ 44.

<sup>21</sup> 47 C.F.R. § 1.106.

<sup>22</sup> 47 C.F.R. § 1.115.

The assumption that Kay intended, by the motion, to conceal the existence of the agreement, is based on fatally flawed logic for yet another reasons. Namely, Kay knew full well that the agreement would be disclosed regardless ultimate disposition of the motion. Less than three months after the motion, Kay produced a copy of the 800 MHz agreement to the Bureau in discovery. This document was produced while the Sobel call signs were still included in the Kay designation order, but it would also have been produced even if the Sobel call signs had been removed as requested in Kay's motion. The two issues had absolutely nothing to do with one another. First, as stated earlier, the vast majority of the Sobel call signs at issue were not even subject to the 800 MHz agreement. Second, Kay was responding to a Bureau request that he produce all agreements relating to his land mobile operations, not just agreements relating specifically to call signs listed in the designation order. Indeed, in addition to the agreement with Sobel, Kay also produced similar agreements with other parties who did not have their call signs implicated in the designation order. In a misguided effort to find deception where it never existed, the Commission is straining to create a nexus between the motion and Kay's intention to disclose the agreement that also does not, and never did, exist.

Nor is the language of the motion itself deceptive. The Commission is obsessed with attempting to attribute to Kay, after the fact, hyper-technical definition of the words "interest" and "employee" as well as to impose an unrealistically broad interpretation of what it means to "do business" in someone else's name. What is lost in this exercise is any good faith effort to consider the words in the context in which they were uttered. As the Court of Appeals recently instructed the Commission, "the imprecise use of [a] phrase" does not support a finding of deceptive intent.<sup>65</sup> In *Lutheran Church-Missouri Synod v. FCC*,<sup>66</sup> the Here, as in Lutheran

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<sup>65</sup> *CJW Transportation Specialists*, 14 FCC Rcd 21417 at ¶ 6 (1999).

<sup>66</sup> 141 F.3d 344 (D.C. Cir. 1998)

he was not privy to the Commission's consideration and adoption of the hearing designation order, and once it was adopted, the rules precluded him from seeking reconsideration of it.

The Presiding Judge asked Kay whether his various legal objections to the 308(b) Request had been presented to a court. Kay explained:

We never had an opportunity to litigate this. If they had given us a subpoena for the documents, we would have been able to challenge their request for the information. Basically, Your Honor, this hearing is the only legal opportunity I have had to challenge their demand for the documents under the 308(b). This is it, Your Honor.<sup>23</sup>

If the Commission had dealt with Kay's objections and concerns by issuing a subpoena—instead of unilaterally adopting a hearing designation order from which there is no right to reconsideration or review—not only would justice have been better served, but more than seven years (so far) of costly litigation might have been avoided.

(3) Unreasonably Overbroad Scope of 308(b) Request

The record fully supports the Presiding Judge's determination that the 308(b) letter was unreasonable in its scope. The Commission does not have the investigatory authority "to require [licensees] to bare their records, relevant or irrelevant, in the hope that something will turn up."<sup>24</sup> The Commission challenges Kay's reliance on *Stahlman*, saying: "We do not read that case as saying that the Commission may only seek information relevant to specific complaints. We believe that it is reasonably within our discretion (and the Bureau's) to determine that the existence of numerous complaints<sup>[25]</sup> about a licensee may warrant a broad investigation of that

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<sup>23</sup> Tr. 1031.

<sup>24</sup> *Stahlman v. FCC*, 126 F.2d 124, 128 (D.C. Cir. 1942).

<sup>25</sup> The Commission's reference to "the existence of numerous complaints" is dubious. The so-called "complaints," which were later produced in discovery, *Wireless Telecommunications Bureau's Response to Kay's First Set of Interrogatories* (served on March 8, 1995), were neither numerous nor credible. Not a single one of the complaints was presented as evidence at hearing, and not a single one of the complainants was called by the Bureau as a witness. Moreover, after a hearing proceeding that has now lasted for over seven years, including extensive discovery and twelve days of trial, the Commission has found none of the allegations in these so-called "complaints" to have merit. This is not surprising, given that the complaints were neither specific nor documented, and they were offered by parties who were clearly prejudiced against Kay. One of the ostensible complainants, a "William Drareg" of "William Drareg & Associates," did not even exist. Kay had on several occasions called this to the Bureau's attention, but not only did the Bureau ignore Kay, it proceeded to rely on the falsified complaint from a nonexistent fantasy man as part of its justification for initiating revocation proceeding against Kay.

This was the sole reference to Sobel in the entire sixteen page pleading that addressed numerous other matters.

Kay had absolutely no reason to believe that the pleading or the affidavits offered in support of it were in any way inaccurate vis-à-vis the 800 MHz agreement. The attorneys who drafted the pleading as well as a supporting affidavit for Sobel were the same attorneys who had, only three months earlier, also drafted the 800 MHz agreement. To be sure, the affidavit did not disclose the existence of the 800 MHz agreement, but Kay could hardly have thought this to be relevant in view of at least two crucial facts: (a) nine of the eleven Sobel call signs erroneously listed in the Kay designation were UHF stations having no affiliation with Kay whatsoever, with or without the 800 MHz agreement; and (b) neither the Kay designation order nor any other indication from the Commission to that point suggested that contractual relations between Sobel and Kay were at issue. Under these circumstances, it is not realistic to expect Kay to have discerned that the specifics of the 800 MHz agreement was the reason for the mistaken inclusion of Sobel's call signs. What ever was going on, there was, based on the Commission's own statements and actions, no reason whatsoever for Kay to conclude that the existence of the 800 MHz agreement was in any way relevant to the correction of the erroneous inclusion of the Sobel call signs in the designation order.

The motion was not, moreover, in response to an expressed concern about real party in interest or transfer of control or about any contractual arrangement between Kay and Sobel. Once again, the designation order in WT Docket No. 94-147 listed some of Sobel's licenses as belonging to Kay, not on the theory that there had been an unauthorized transfer of control of those licenses to Kay, but rather on the mistaken theory that Marc Sobel was a fictitious alias used by Kay. Kay's primary focus and his entire mindset at the time he reviewed this aspect of the motion was simply to clarify that he and Sobel were indeed a unique individuals, separate from one another, and that the particular call signs at issue were not his licenses.

licensee's compliance."<sup>26</sup> What ever validity that sentiment may have in a vacuum, it is entirely inapposite to the facts of this case.

The Section 308(b) Request was so general in its terms and so expansive in its scope that it is being literal as well as colorful to characterize it as a fishing expedition. It demanded that Kay produce virtually every document relating to his repeater business.<sup>27</sup> The request sought information for every single station licensed to Kay, encompassing more than 150 call signs, many with multiple repeater sites, throughout the Los Angeles area.<sup>28</sup> Kay ultimately produced over 38,000 documents in discovery, and only about 2,000 to 4,000 documents less would have been required to comply with the 308(b) letter.<sup>29</sup> The over breadth of the request prompted Kay's attorneys to seek clarification and narrowing of the request.<sup>30</sup>

The 308(b) letter sought the business records that documented or corroborated the loading on Kay's various repeaters. Kay did not maintain records that provided historical data regarding the number of units assigned to each particular repeater, nor was he required by any rule to do so. To provide the requested information, Kay examined and produced a number of different documents in addition to billing records, including the customers' repeater contracts, invoices for radios, work orders for programming radios, etc. Because the 308(b) request sought information for each and every one of Kay's more than 150 call signs—even stations that are not subject to loading requirements—this was a daunting task. When essentially the same

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<sup>26</sup> Kay Decision at ¶ 43.

<sup>27</sup> E.g., Tr. 1030-1031, 1040-1042, 1078-1082.

<sup>28</sup> Tr. 1039-1040.

<sup>29</sup> Tr. 2355.

<sup>30</sup> WTB Exs. 7 & 9. These objections were never seriously considered, but rather were immediately and summarily rejected, WTB Exs. 8 & 10. Less than 24 hours after Kay sought clarification and narrowing of the 308(b) letter, the Bureau unilaterally declared that the "request asks for basic information that Mr. Kay would have readily available if he is indeed providing communication services to customers." WTB Ex. 8 at p. 1. The Bureau had absolutely no basis for this conclusion, because it did not know anything about the manner in which Kay maintained his business records. The Bureau nonetheless arrogantly—and erroneously—assumed that "such information would be a necessity in order to even issue monthly bills to users of the many systems for which he is apparently licensed." *Id.* The record demonstrates that Kay was indeed serving and billing customers, notwithstanding the fact that his records were not maintained in the form the Bureau incorrectly assumed.

asserting that Sobel was a fictitious Kay alias: "Information available to the Commission also indicates that James A. Kay, Jr. may have conducted business under a number of names. Kay could use multiple names to thwart our channel sharing and recovery provisions .... We believe these names include some or all of the following: Air Wave Communications [and] Marc Sobel dba Airwave Communications."<sup>60</sup> The designation order did not state that the Commission was inquiring into the relationship between Sobel and Kay, nor did it state that the Commission was concerned about the propriety of contractual relationships between Sobel and Kay.<sup>61</sup> The Commission erroneously believed Sobel was a fictitious name being used by Kay. The specific call signs being targeted for revocation were listed in Appendix A to the designation order, and included eleven call signs that were licensed to Sobel.<sup>62</sup>

(4) The Motion and Affidavit

On or about January 25, 1995, Brown and Schwaninger, acting on Kay's behalf, submitted in the above-captioned proceeding a pleading entitled "Motion to Enlarge, Change or Delete Issues."<sup>63</sup> That pleading included the following statement:

James A. Kay, Jr. is an individual. Marc Sobel is a different individual. Kay does not do business in the name of Marc Sobel or use Sobel's name in any way. ... Kay has no interest in any of the licenses or stations held by Marc Sobel. Marc Sobel has no interest in any of the licenses or stations authorized to Kay or any business entity in which Kay holds an interest. Because Kay has no interest in any license or station in common with Marc Sobel and because Sobel was not named as party to the instant proceeding, the Commission should either change the [designation order] to delete the reference to the stations identified as stations 154 through 164 in Appendix A, or should dismiss the [designation order] with respect to those stations.<sup>64</sup>

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<sup>60</sup> *James A. Kay, Jr.*, 10 FCC Rcd 2062 at ¶ 3 (1994) ("*Kay HDO*"). Some of the other names listed were in fact trade names used by Kay or entities owned by Kay and through which he did business, *e.g.*, Buddy Corp., Southland Communications, and Oat Trunking. It is clear from the context that the Commission considered *all* of the listed names, including Sobel, to be Kay aliases or companies owned by Kay.

<sup>61</sup> Conspicuously absent from the designation order were any real party in interest or transfer of control issues.

<sup>62</sup> *Kay HDO*, Appendix A, items 154-164

<sup>63</sup> WTB Ex. 343.

<sup>64</sup> WTB Ex. 343 at pp. 4-5.

information was provided in discovery, it amounted to more than 38,000 documents. After Kay produced these documents, the Bureau ignored them, unilaterally choosing to focus solely and exclusively on the billing records—even though the billing systems was not designed to track system loading and, in fact, did not provide a complete or accurate picture of loading.

While Kay does not question the authority, or even the obligation, of the Commission to investigate complaints of regulatory violations, this does not justify the abuse of that authority that occurred in this case. And even if the Commission does not concur in Kay's characterization of these events as abuse, it must nonetheless concede that Kay's objections and efforts at limiting the scope of the inquiry not only did not violate Section 308(b), but were indeed a valid assertion of his legal rights.

#### **B. Kay's Conduct Justified and Reasonable**

Separate and apart from the legal objections surrounding the scope and burdensomeness of the information request, confidentiality concerns, moreover, Kay's conduct was more than reasonable in light of (a) Kay's justified lack of confidence in any Bureau assurances of confidentiality, and (b) the practical and logistical difficulties resulting from the Northridge earthquake.

##### **(1) Confidentiality Concerns**

Kay was justified in his apprehension that the Bureau would not adequately protect the confidentiality of any information he produced in response to the 308(b) letter. The Bureau's assurance, which was not prompt in coming, that it had "no intention of disclosing Kay's proprietary business information, except to the extent we would be required by law to do so,"<sup>31</sup> was of no comfort given the Bureau's actual deeds. This is a classic case of actions speaking far louder than words.

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<sup>31</sup> WTB Ex. 10.

actual existence, Sobel asked the law firm of Brown and Schwaninger to prepare a written agreement to document the relationship between him and Kay with respect to these 800 MHz stations.

The record is perfectly clear that Kay's and Sobel's purpose in having the agreement reduced to writing was nothing other than an attempt to concretely clarify his separateness and distinction from Kay as unique individual.<sup>58</sup> The draft designation order to which Kay and Sobel became privy in the Fall of 1994 said nothing about any contractual or business relationship between the two men. As already discussed, the draft designation order deemed Sobel to be a fictitious alias being used by Kay. The draft document did not even acknowledge Sobel's existence as a separate licensee, and it most certainly did not single out or even mention in any way the minority of Sobel stations that were subject to the 800 MHz resale/management agreement with Kay. Apart from the Commission's apparent misconception that Sobel was not a real person, there was no need in put anything in writing. The parties had quite happily and satisfactorily operated under an oral understanding up to that time. Sobel was not dissatisfied with Kay's performance under the pre-existing oral arrangement and had no reason to distrust Kay. Sobel had no desire to modify the relationship, and the parties in fact did not change the operative aspects of the relationship in any way after executing the written agreement.<sup>59</sup> The very fact that Kay and Sobel reduced the agreement to writing—and arrangement they had been operating under for years based on an oral understanding—is utterly inconsistent with an intent to conceal it.

### (3) The Kay Designation Order

On December 14, 1994, the Commission released the formal hearing designation order in the Kay license revocation proceedings. That order included virtually the same language

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<sup>58</sup> Kay Tr. 1761, 1764; Sobel Tr. 259-263, 299-301.

<sup>59</sup> Sobel Tr. 258, 263.



(a) *The Request for 50 Copies*

In the initial response to the 308(b) letter, Dennis C. Brown, Kay's legal counsel, requested confidentiality. On March 1, 1994, the Bureau responded by a letter<sup>32</sup> that both Kay and his legal counsel deemed to be a denial of that request.<sup>33</sup> Although the Bureau held open the possibility that Kay could submit a formal request for confidentiality pursuant to Section 0.459 of the Rules, Kay understood that this request would have to be accompanied by the very materials he was seeking to keep confidential.<sup>34</sup> He was very much concerned about a process that required him to submit all the documents and then have the Bureau staff make an after-the-fact determination as to which documents would be publicly released.<sup>35</sup> Accordingly, two letters submitted by Kay's counsel on April 7, 1994, included copyright notices across the bottom of each page, stating as follows: "Entire contents copyright, James A. Kay, Jr. 1994. All rights reserved. No portion of this document may be copied or reproduced by any means." WTB Exs. 2 & 3.

On May 11, 1994, a month after Brown's April 7 letters containing the copyright notice, the Bureau wrote a letter directly to Kay stating that information was required in response to the 308(b) letter before the Commission could process certain of Kay's pending applications. WTB Ex. 4. The Bureau stated: "Please be advised that if you claim copyright protection in your response, we require that you file 50 copies of your response ... as well as a full justification of how the copyright laws apply, including statutory and case cites ...." *Id.* Just two days later, on May 13, 1994, the Bureau sent a virtually identical letter directly to Kay, making the same request in connection with another pending application and containing the same language requesting 50 copies if Kay sought copyright protection for his response. Kay Ex. 49. Kay was

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<sup>32</sup> WTB Ex. 349.

<sup>33</sup> Tr. 1028-1029; WTB Ex. 3 at p. 5.

<sup>34</sup> Tr. 1029-1030.

<sup>35</sup> Tr. 1030-1031.

Commission's attention in a challenge of the licensee's renewal application.<sup>54</sup> If the Commission is unable to find intent to deceive in circumstances such as those, it can not possibly attribute such intent to Kay.

## **B. No Record Evidence of Deceptive Intent**

The erroneous conclusion that Kay was lacking in candor with the Commission must be reversed for the lack of evidence of any deceptive intent on Kay's part. Not only is the record devoid of any evidence whatsoever that Kay intended to falsify or conceal information from the Commission, there is indeed substantial and compelling evidence to the contrary.

### **(1) The Draft Designation Order**

In the fall of 1994, Kay obtained (through a FOIA request) the draft of a hearing designation order proposing the revocation of Kay's licenses. The draft, which Kay shared with Sobel,<sup>55</sup> contained the following language: "Information available to the Commission also includes that James A. Kay, Jr. has done business under a number of assumed names. We believe that these names include some or all of the following: Air Wave Communications ... [and] Marc Sobel dba Airwave Communications."<sup>56</sup> Air Wave Communications is a name under which Sobel does business separate and apart from any of his dealings with Kay.<sup>57</sup>

### **(2) 800 MHz Resale/Management Agreement**

Although Sobel operated his own land mobile radio business independently of Kay, primarily involving UHF facilities in the 470-512 MHz range, Sobel also held some 800 MHz authorizations that were subject to an oral resale/management arrangement with Kay. After learning of the draft designation order and the Commission's apparent misunderstanding of his

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<sup>54</sup> 16 FCC Rcd 1174 at ¶¶ 2-24 (2001). Accord, *Kansas Public Telecommunications Services, Inc.*, 14 FCC Rcd 12112 (1999); *National Broadcasting Co.*, 14 FCC Rcd 9026 (1999); *WRKL Rockland Radio, L.L.C.* [cite?] (1999); *CRC Broadcasting Company, Inc.*, 14 FCC Rcd 1038 (1999).

<sup>55</sup> Sobel Tr. 262-262; Kay Tr. 1751-1752.

<sup>56</sup> Kay Ex. 5 at p. 2, ¶ 4.

<sup>57</sup> Kay Tr. 1152-1153, 1752.

extremely concerned because the 308(b) letter was seeking “literally the entirety of the most confidential information of my company.” Tr. 2342.<sup>36</sup>

On May 17, 1994, Brown responded to the Bureau’s May 11 and May 13, 1994, letters, and specifically challenged the Bureau on the request for 50 copies:

We respectfully note that we have filed the number of copies of Mr. Kay’s response which are required to be filed by Section 1.51 of the Commission’s Rules. However, you have requested 50 additional copies .... Since the Commission could not possibly require 50 copies for its own internal use, the only reasonable conclusion is that the Commission intends to make further circulation of Mr. Kay’s response beyond the Commission. It was specifically to prevent such distribution that ... that Mr. Kay requested confidentiality for his response and provided the Commission with notice of his copyright.<sup>37</sup>

The Bureau ignored this objection. In a letter dated May 26, 1994, Brown again asserted that the “request that [Kay] submit 50 copies ... clearly indicates [an] intent to disclose information to a substantial number of members of the public, even though Kay has not received notice ... that any person had requested the information.”<sup>38</sup> Brown expressly and specifically asked for comment and clarification as to this point.<sup>39</sup> The next day, on May 27, 1994, the Bureau, wrote a response to Brown. WTB Ex. 10. While addressing various other points raised in Browns May 26 letter, the Bureau neither acknowledged nor answered Browns pointed and explicit expression of concern and request for clarification as to the demand for 50 copies of Kay’s responsive materials.<sup>40</sup>

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<sup>36</sup> Kay’s confidentiality concerns did not arise in a vacuum. Shortly after Kay received the Section 308(b) letter, he became aware that his competitors had copies of it and were showing it around the Los Angeles mobile radio community. Tr. 2498-2499. The Bureau had sent blind carbon copies of the Section 308(b) letter to at least six different individuals who were competitors, customers, and/or potential customers of Kay. Tr. 2497-2498; Kay Ex. 62. Kay’s competitors were already using the letter against him, and he knew they would certainly attempt to get their hands on any information he produced in response to it.

<sup>37</sup> WTB Ex. 5 at p. 1.

<sup>38</sup> WTB Ex. 9 at pp. 2-3.

<sup>39</sup> *Id.* at p. 3.

<sup>40</sup> *Id.*

discovery, and he estimates that only 2,000 to 4,000 documents less would have been required to comply with the 308(b) letter.<sup>50</sup> Kay stated that during the weeks and months following the earthquake, it would have been literally impossible to have complied with the Section 308(b) letter, because he had no staff, no personal availability, and everything was in total disarray.<sup>51</sup> The Commission also conveniently ignores the fact that, by June 1994, Kay's confidentiality concerns were at their highest, the Wypijewski incident having just occurred in April 1994.

### III. LACK OF CANDOR ISSUE

#### A. Deceptive Intent a Prerequisite

"A necessary and essential element of both misrepresentation and lack of candor is intent to deceive."<sup>52</sup> Inaccuracy due to carelessness, exaggeration, faulty recollection, etc., do not suggest the deceptive intent normally required for disqualification.<sup>53</sup> The Commission's treatment of Kay in this case can not be squared with well-established precedent. For example, in *Curators of the University of Missouri*, the Commission found "no evidence of an intent to deceive that would support a finding of misrepresentation or lack of candor" where the licensee's failure to report prior discrimination complaints in its FCC Form 396 (a standard EEO reporting form), even though (1) the Commission rejected the licensee's contention that it was unclear whether the form applied to part time employees; (2) the licensee further failed to disclose the complaints in response to direct correspondence from Commission staff explicitly directing it to identify "any other employment discrimination complaint(s) filed ... during the current license term"; and (3) the licensee disclosed the complaints only after the matter was called to the

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<sup>50</sup> Tr. 2355.

<sup>51</sup> Tr. 2355-2356.

<sup>52</sup> *Trinity Broadcasting of Florida, Inc.*, 10 FCC Rcd. 12020, 12063 (1995). See also *Weyburn Broadcasting Limited Partnership v. FCC*, 984 F.2d 1220, 1232 (D.C. Cir. 1993); *Garden State Broadcasting Ltd. v. FCC*, 996 F.2d 386, 393 (D.C. Cir. 1993); *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179, 1196 (1986); *Fox Television Stations, Inc.*, 10 FCC Rcd 8452, 8478 (1995); *Swan Creek Communications v. FCC*, 39 F.3d 1217, 1222 (D.C. Cir. 1994); *Abacus Broadcasting Corp.*, 8 FCC Rcd 5110, 5112 (Rev. Bd. 1993); *Pinelands, Inc.*, 7 FCC Rcd 6058, 6065 (1992).

<sup>53</sup> See *MCI Telecommunications Corp.*, 3 FCC Rcd 509, 512 (1988), citing *Kaye-Smith Enterprises*, 71 FCC 2d 1402, 1415 (1979); *Standard Broadcasting, Inc.*, 7 FCC Rcd 8571, 8574 (Rev. Bd. 1992).

The Bureau's persistent demand for 50 copies of the material disturbed Kay and made him extremely apprehensive that the information would find its way into the hands of his competitors. Kay "was totally incredulous."<sup>41</sup> He explained:

I knew of no reason whatsoever why the Commission would ever want 50 copies of the most confidential information of my company for any other purpose but to distribute it. We had asked for confidentiality, they had refused it. When we said we were going to copyright it, now they want 50 copies of it. ... What could they possibly want 50 copies for, but to give it to exactly everybody I didn't want to have it? My competitors who are public and who knows who, anybody conceivably that asked for it. I just couldn't do that. It was extraordinary. I was flabbergasted and dismayed.<sup>42</sup>

*(b) The Thompson Tree Incident*

In April 1994, before Kay's response to the 308(b) letter was due, an event occurred that increased Kay's suspicions and apprehension that the Bureau staff was acting in bad faith. At the time of the 308(b) letter, Kay had pending before the Commission a request pursuant to the Commission's "finder's preference" program in which he was seeking a dispositive preference for a frequency that had been abandoned by another licensee, Thompson Tree Service. The purpose of the finder's preference program was to promote efficient spectrum utilization by encouraging licensees to locate unused authorizations. Such "finders" were rewarded with

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<sup>41</sup> Tr. 2344.

<sup>42</sup> Tr. 2344-23245. Competitive considerations were not the only basis for Kay's confidentiality concerns. In addition to seeking the identity and contacts for Kay's customers, the Bureau was also seeking information regarding the configuration of the customers' systems. Kay believed he had a duty to his customers, over and beyond his own self-interest, to hold such information in the strictest confidence. He testified as follows:

The release of that information to the public would not only adversely affect my company, but my customers, as well. It is -- radio shops just do not release the system configuration of their customers' radio systems to the public. It's like releasing private citizens' cellular telephone numbers. It's just simply not done.

The consequences to my company would be direct and economic. It would probably ruin my company. My customers expect me to maintain confidentiality of their records and their system configurations. I can't just release customers' information to the public. Can you imagine the liability of releasing an armored transport company's frequency codes to the public? All it takes is one robbery where the bad guys know the frequency information and there's big trouble.

The same goes with alarm response companies and armed guard companies. We just cannot release that information to the public under any circumstances. To do so would endanger lives and property of my customers, their employees, and the liability to my company would be incredible.

Tr. 2342-2343.

much less anything approaching detailed supervision, over his communications counsel as he might have under different circumstances.<sup>47</sup> *Id.*

The earthquake also directly affected Kay's literal and physical ability to respond to the 308(b) letter. His offices were a shambles. Computer damage prevented him from having complete access to computer records. Indeed, the record reflects that it took Kay's staff two to three months to manually reconstruct the computer database. Kay also did not have extensive personal availability or access to staff support in the weeks and months immediately following the earthquake. The record establishes that Kay did not have the computer capability to provide the Bureau the information it sought. In this regard, the program Kay utilized did not keep the information in the configuration the Bureau wanted. After designation, Kay modified the program to provide the Bureau with the requested information. It is questionable whether Kay had to go to these extremes prior to designation or, for that matter, even after designation. The Commission has no prescribed format for how licensees must maintain loading records, and may therefore not fault Kay because the records he maintained in his normal business practice did not satisfy the Bureau's *ad hoc* expectations and demands.

The impact of the earthquake continued long after the immediate event. Aftershocks continued for as long as six months following the main quake,<sup>48</sup> and that Kay and his limited staff have still not fully recovered from the earthquake even to the time of the hearing.<sup>49</sup> In response to discovery requests, Kay produced virtually all of the same information requested in the 308(b) letter. The task required more than three of his staff to devote almost three months to nothing but this project, and it also required 40 to 60 hours of his personal time to compile the information. And this was all done in 1995, after he had "more or less" put the company back together after the earthquake. Kay ultimately produced over 38,000 documents to the Bureau in

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<sup>47</sup> *Id.*

<sup>48</sup> Tr. 1684-1685, 1688, 2344.

<sup>49</sup> Tr. 2516-2517.

dispositive preferences allowing them to apply for the abandoned channel without being subject to competing challenges.<sup>43</sup>

Kay had previously written to the Bureau explaining that the Thompson Tree facility had been abandoned, and informally asking that the authorization be purged in accordance with the FCC's rules. He later filed the formal finder's preference request when the Bureau did not act on his informal request. In response to Bureau inquiries, Thompson Tree admitted that it had stopped using the station more than two years earlier, but expressed a desire to nonetheless retain the license in order to preserve the investment they had in the station. Kay thereupon contacted Gail Thompson of Thompson Tree and reached an accommodation with her whereby Thompson Tree would acquiesce in the cancellation of its license and Kay would provide it with repeater service so they would not lose their investment in their radio system.<sup>44</sup>

About a week to ten days later, Gail Thompson called Kay to report that she had just received an unsolicited telephone call from Anne Marie Wypijewski, the Bureau staff attorney handling Kay's finder's preference request. Significantly, Wypijewski is the same Bureau staff attorney who drafted the 308(b) letter to Kay, and who sent copies of it to Kay's competitors on an ex parte basis. Wypijewski advised Ms. Thompson that the Bureau had no choice but to cancel the Thompson Tree authorization and would be doing so shortly, but that Thompson Tree could immediately reapply for the authorization. Wypijewski did not formally advise Kay of the denial of his finder's preference request until about a week after her telephone call to Gail Thompson.<sup>45</sup>

Kay viewed Wypijewski's actions as a blatantly improper maneuver which destroyed any confidence he might otherwise have had that information he provided to the Bureau would be held in confidence or that the Bureau was acting in good faith. As he explained:

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<sup>43</sup> Tr. 2345-2346.

<sup>44</sup> Tr. 2347.

<sup>45</sup> Tr. 2347, 2547.

This was equivalent to a judge -- because Anne Marie is decision-making staff acting, in fact, as a judge, weighing our finder's preference, releasing what she's going to do, how she's going to rule, before she releases the ruling, to tell Mrs. Thompson how to beat the effect of the ruling, to literally take from me that which I had reported in good faith to the Commission and had filed as a finder's preference. It was, to me, a direct stab at me to take away that which I had worked for, that I had in accordance with the rules, properly filed and was, in fact, an invalid license. She was taking away from me that which I had worked for and was doing it without notifying me ...

I was thoroughly of the opinion it was highly improper if not what they call *ex parte* representation made. This wasn't Mrs. Thompson calling in to check on something. This was Anne Marie going out of her way to tell Mrs. Thompson how to beat James Kay on a perfectly legitimate finder's preference and a perfectly legitimate report that Mrs. Thompson's license is canceled automatically. It was a way of sticking me and to help Mrs. Thompson and it just plain was wrong. ...

I can't trust the Commission to play by the rules and maintain confidentiality, but going out of their way to make telephone calls to tip people off how to beat me, with pre-release of decision material, how can I trust them?<sup>46</sup>

The Commission may not simply dismiss these legitimate confidentiality concerns while totally ignoring the conduct of its own staff that gave Kay every reason to be skeptical and untrusting of the Bureau.

(2) The Northridge Earthquake

Kay received the 308(b) letter only two weeks after the Northridge earthquake, a devastating natural disaster that did substantial damage to his business and his personal residence. He was understandably preoccupied with earthquake recovery, and left the details of dealing with the 308(b) letter to his Washington, D.C. communications counsel. Several of Kay's employees and even one of his local attorneys testified as to the effect the earthquake had on Kay's state of mind. He was distracted, preoccupied, and had difficulty focusing his attention. In other words, Kay behaved as any person would who has just gone through a serious natural disaster and had his life turned upside down. Clearly he did not exercise the degree of oversight,

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<sup>46</sup> Tr. 2349-2350.